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**Dato' Tan Kim Hor & Ors v
Tan Chong Consolidated Sdn Bhd**

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02-735
OF 2001
LOW HOP BING, KN SEGARA AND SULAIMAN DAUD, JJCA
14 JANUARY 2009

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Companies and Corporations — Directors — Right to inspect company's books of account — Whether auditor's letter of undertaking failed to comply with statutory requirements and was defective — Whether undertaking addressed to court — Whether words 'extend to appointed servants/agents' in letter of undertaking transformed it into conditional or defective undertaking — Companies Act 1965 s 167(6) — Interpretation Acts 1948 and 1967 s 17A

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The plaintiffs/appellants were the majority members of the board of directors of the defendant/respondent company as from 1985 until 25 August 2000. On 28 August 2000, the plaintiffs filed an originating summons seeking an order to inspect the accounting and other records of the defendant company by a qualified auditor pursuant to s 167(6) of the Companies Act 1965 ('the Act'). The defendant vehemently objected to this application. The trial judge

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who found that the defendant had failed to discharge its burden to show that the plaintiffs' inspection would result in any detriment to the interests of the defendant nevertheless sustained the defendant's objection and dismissed the plaintiffs' application. Hence the plaintiffs' appeal herein. In their appeal the plaintiffs contended that the trial judge had erred in holding that the auditor's

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letter of undertaking was insufficient to meet the requirements of s 167(6) of the Act. The defendant submitted that the letter of undertaking furnished by the auditor was defective because it was not addressed to the court and was extended to include a class of persons beyond the plaintiffs. The issue before

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the court in this appeal was whether the statutory right of a director to inspect the books and other records was lost because the auditor's letter of undertaking had failed to comply with the statutory requirements and was therefore defective.

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Held, allowing the appeal with costs in this court and the court below:

- (1) Although it was true that the letter of undertaking did not contain a clause expressly addressing it to the court, its inclusion as one of the exhibits annexed to the affidavit in support of the plaintiffs' application

- made it clear that the undertaking was intended to fulfil the requirements of s 167(6) of the Act. Section 167(6) of the Act deserves to receive a purposive interpretation which is now given statutory recognition in s 17A of the Interpretation Acts 1948 and 1967. In any case s 167(6) does not prescribe a statutory form of undertaking. Therefore, the letter of undertaking in this case, which had been given for the purpose of carrying out the inspection with the information obtained thereby not to be disclosed, was in substance clear and unambiguous and meant for use in the court (see paras 22–23). A B
- (2) The innocuous inclusion of the words ‘extend to appointed servants/agents etc’ in the letter of undertaking did not in any way transform the undertaking into a conditional or defective undertaking (see para 24). C
- (3) Section 167(6) of the Act was intended to facilitate and liberalise and not impede the right of inspection. In fact almost unbridled powers are conferred upon the court to give effect to the directors’ right of inspection. Thus, it was within the powers of the court to allow the plaintiffs to furnish a fresh undertaking with fresh terms such as to have it addressed to the court and to delete the words ‘extend to appointed servants/agents etc’ therefrom. This was especially so since the trial judge had made a specific decision that the defendant had failed to discharge its burden to show that the plaintiffs’ inspection would result in any detriment to the interests of the defendant. That is a reaffirmation that the directors’ right of inspection pursuant to s 167(6) is absolute (see para 28). D E F

[Bahasa Malaysia summary]

Plaintif-plaintiff/perayu-perayu adalah ahli majoriti di dalam lembaga pengarah syarikat defendan/responden dari 1985 hingga 25 Ogos 2000. Pada 28 Ogos 2000, plaintif-plaintif telah memfailkan saman pemula memohon satu perintah untuk memeriksa akaun dan rekod-rekod lain syarikat defendan oleh juruaudit yang berkeelayakan menurut s 167(6) Akta Syarikat 1965 (‘Akta’). Defendan dengan bersungguh-sungguh membantah permohonan ini. Hakim bicara yang mendapati bahawa defendan telah gagal untuk melepaskan bebannya untuk menunjukkan bahawa pemeriksaan plaintif-plaintif akan menjejaskan kepentingan defendan walau bagaimanapun mengekalkan bantahan defendan dan menolak permohonan plaintif-plaintif. Oleh itu, plaintif merayu. Di dalam rayuan mereka, plaintif-plaintif menegaskan bahawa hakim bicara telah terkhilaf di dalam memutuskan bahawa surat akujanji juruaudit tidak mencukupi untuk memenuhi keperluan s 167(6) Akta. Defendan menghujahkan bahawa surat akujanji yang disediakan oleh juruaudit adalah cacat kerana ia tidak G H I

A ditujukan kepada mahkamah dan telah dilanjutkan untuk memasukkan sekumpulan orang selain daripada plaintif-plaintif. Isu di hadapan mahkamah di dalam rayuan ini adalah sama ada hak statutori pengarah untuk memeriksa buku kira-kira dan rekod lain hilang kerana surat akujanji juruaudit telah gagal memenuhi keperluan statutori dan oleh itu adalah cacat.

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Diputuskan, membenarkan rayuan dengan kos di mahkamah ini dan di Mahkamah Tinggi:

- C (1) Walaupun adalah benar bahawa surat akujanji tidak mengandungi klausa yang jelas ditujukan kepada mahkamah, pemasukannya sebagai salah satu ekshibit yang dilampirkan di dalam affidavit sokongan terhadap permohonan plaintif-plaintif menjadikannya jelas bahawa akujanji adalah bertujuan untuk memenuhi keperluan s 167(6) Akta. Seksyen 167(6) Akta layak untuk menerima pentafsiran maksud yang mana sekarang diberikan pengiktirafan statutori di dalam s 17A Akta Pentafsiran 1948 dan 1967. Di dalam mana-mana kes s 167(6) tidak menyatakan bentuk statutori akujanji. Oleh itu, surat akujanji di dalam kes ini, yang telah diberikan untuk tujuan melaksanakan pemeriksaan dengan maklumat yang diperolehi dengan itu tidak boleh dikemukakan, adalah pada amnya jelas dan tidak kabur dan bertujuan untuk digunakan di dalam mahkamah (lihat perenggan 22–23)
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- F (2) Kemasukan yang tidak berbahaya perkataan ‘dipanjangkan untuk melantik pembantu/agen dll’ di dalam surat akujanji langsung tidak menukar akujanji kepada akujanji bersyarat atau cacat (lihat perenggan 24).
- G (3) Seksyen 167(6) Akta adalah bertujuan untuk membantu dan melonggarkan dan tidak menghalang hak untuk memeriksa. Malahan boleh dikatakan kuasa tidak dikawal telah dikurniakan ke atas mahkamah untuk memberi kesan kepada hak pemeriksaan pengarah. Oleh itu, ianya adalah di dalam kuasa mahkamah untuk membenarkan plaintif-plaintif menyediakan akujanji yang baru dengan terma-terma yang baru seperti mengkehendakinya ditujukan kepada mahkamah dan memadamkan perkataan ‘dipanjangkan untuk melantik pembantu/agen dll’ di dalamnya. Ini terutamanya apabila hakim bicara telah membuat keputusan yang spesifik bahawa defendan telah gagal untuk melepaskan bebannya untuk menunjukkan bahawa pemeriksaan plaintif-plaintif akan menjejaskan hak defendan. Ini adalah penegasan semula bahawa hak pemeriksaan pengarah menurut s 167(6) adalah mutlak (lihat perenggan 28).]
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Notes

For cases on directors generally, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 153–355.

Cases referred to

Australian Metropolitan Life Assurance Co Ltd v Ure & Ors (1923) 33 CLR 199, HC (refd)

Berlei Hestia (NZ) Ltd v Fernyhough [1980] 2 NZLR 150 (refd)

Conway & Ors v Petronius Clothing Co Ltd & Ors [1978] 1 All ER 185; [1978] 1 WLR 72, Ch D (refd)

Dato Aw Kow v Haw Par Bros (Pte) Ltd [1972] 2 MLJ 225; [1972–1974] SLR 391, HC (refd)

Dato' Ting Cheek Sii v Sanyan Wood Industries Sdn Bhd [2007] MLJU 38; [2007] 1 LNS 280, HC (refd)

Deluge Holdings Pty Ltd & Anor v Bowlay & Ors (1991) 9 ACLC 1486 (refd)

Edman v Ross (1922) 22 SR (NSW) 351 (refd)

Geneva Finance Ltd (Receiver and Manager Appointed), Re (1992) 10 ACLC 668 (refd)

Haw Par Brothers v Dato Aw Kow [1973] 2 MLJ 169; [1972–1974] SLR 183, CA (refd)

Leong Sun Wing v Wah Hup Engineering Works Sdn Bhd (No 2) [1977] CSLR VII [1003] (refd)

Loh Yoon Sang v Ivory Pearl Sdn Bhd [2003] MLJU 302; [2003] 7 CLJ 405, HC (refd)

Molomby v Whitehead & Australian Broadcasting Corp (1985) 63 ALR 282, FC (refd)

Paul Nicholson lwn Faber Medi-Serve Sdn Bhd dan lain-lain [2002] 1 MLJ 355, HC (refd)

Welch & Anor v Britannia Industries Pte Ltd [1993] 1 SLR 673, HC (refd)

Wuu Khok Chiang George v ECRC Land Pte Ltd [1999] 3 SLR 65, CA (refd)

Legislation referred to

Companies Act 1965 s 167, 167(1), (3), (6)

Companies Act [Singapore] s 199

Interpretation Acts 1948 and 1967 ss 17A, 71

Appeal from: Originating Summons No D2–24–212 of 2000 (High Court, Kuala Lumpur, Commercial Division).

Ben Chan (Vanessa Wong with him) (Mah-Kamariyah & Phillip Koh) for the appellants.

Lim Kian Leong (Tan Pak Theen with him) (Lim Kian Leong & Co) for the respondent.

A Low Hop Bing JCA (delivering judgment of the court):

APPEAL

B [1] On 1 December 2008, we allowed the appeal by the appellants ('the plaintiffs') against the decision of the learned High Court judge.

[2] We now give our grounds.

C [3] Unless otherwise stated, a reference hereinafter to a section is a reference to that section in the Companies Act 1965.

FACTUAL BACKGROUND

D [4] The defendant is a private exempt company incorporated on 7 June 1972.

E [5] The plaintiffs were the majority members of the defendant's board of directors from 1985 until 25 August 2000 ie three days before the filing of the originating summons on 28 August 2000.

F [6] On or about 25 August 2000, at an annual general meeting of the respondent (the defendant), two additional directors were appointed to the defendant's board of directors.

G [7] The defendant had vehemently objected to the plaintiffs' application vide the originating summons, seeking an order to inspect the accounting and other records of the defendant by a qualified auditor pursuant to s 167(6) of the Companies Act 1965.

H [8] After hearing submissions, the learned judge sustained the defendant's objection and dismissed the plaintiffs' originating summons. Hence, the plaintiffs' appeal herein.

BURDEN OF PROOF

I [9] It is settled law that the defendant, having resisted the plaintiffs' right to inspect the accounting and other records of the defendant, bears the burden of proving that the plaintiffs' right is being, or will be, exercised for an improper purpose: *Australian Metropolitan Life Assurance Co Ltd v Ure & Ors* (1923) 33 CLR 199, per Isaacs J; and *Wuu Khok Chiang George v ECRC Land Pte Ltd* [1999] 3 SLR 65 CA, per LP Thean JA.

[10] It is for the defendant to show 'clear proof' and to satisfy the court 'affirmatively' that the grant of the right of inspection would be for a purpose detrimental to the interests of the company. There must be a 'real ground' that the right would be abused and that substantial harm would be caused to the company thereby: *Wuu Khek Chiang George*.

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[11] There is no burden on the plaintiffs as directors to show any particular reason for their request for inspection. This will ordinarily be assumed: *Molomby v Whitehead & Australian Broadcasting Corp* (1985) 63 ALR 282; and *Wuu Khek Chiang George*.

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[12] Reverting to the instant appeal, it is to be noted that on this issue, the decision of the learned judge is that the defendant had not affirmatively discharged the burden of proof, as no real ground has been positively asserted.

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[13] In our judgment, the learned judge is correct. It is therefore not surprising that the defendant has preferred no appeal therefrom.

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THE RIGHT TO INSPECT

[14] The right of the plaintiffs as directors to inspect the defendant's accounting and other records is governed by specific statutory provisions, viz s 167(1), (3) and (6), expressed in the following words:

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PART VI

ACCOUNTS AND AUDIT

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DIVISION 1

ACCOUNTS

Accounts to be kept

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167(1) Every company and the directors and managers thereof shall cause to be kept such accounting and other records as will sufficiently explain the transactions and financial position of the company and enable true and fair profit and loss accounts and balance sheets and any documents required to be attached thereto to be prepared from time to time, and shall cause those records to be kept in such manner as to enable them to be conveniently and properly audited.

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(1A) ...

(2) ...

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(3) The records referred to in subsection (1) shall be kept at the registered office of the company or at such other place in Malaysia as the directors think fit and shall at all times be open to inspection by the directors.

- A (4) ...
- (5) ...
- (6) The Court may in any particular case order that the accounting and other records of a company be open to inspection by an approved company auditor acting for a director, but only upon an undertaking in writing given to the Court that information acquired by the auditor during his inspection shall not be disclosed by him except to that director.
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- C [15] These statutory provisions have received judicial illuminations, resulting in the enunciation of certain established principles.
- D [16] The relevant established principles have been succinctly stated by the Singapore Court of Appeal in *Wuu Khek Chiang George*. There, the appellant, a director of the respondent, took out an application under s 199 of the Singapore Companies Act (equipollent to our s 167) for an order requiring the respondent to inspect its accounting and financial records. The High Court judge dismissed the application. After reviewing a long line of authorities, the Court of Appeal allowed the appellant's appeal and held, *inter alia*, that:
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- (1) the right of a director of a company to inspect its accounting and other records is a right existing at common law and is recognised in s 199 of the Companies Act. Such right is a concomitant of the fiduciary duties of good faith, care, skill and diligence which the director owes to the company, and as such, like other rights and powers, must be exercised for the benefit of the company. The obligation of the company to allow inspection by its director is mandatory;
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- G (2) this right has been described as being 'absolute'. A director is *prima facie* entitled to inspection and is not required to demonstrate any particular ground or 'need to know' as a basis: *Molomby*. So long as the right is exercised for the proper performance of the director's duties to the company and not with a view to causing any detriment to the company, it is in that sense 'absolute': see eg, *Dato Aw Kow v Haw Par Bros (Pte) Ltd* [1972] 2 MLJ 225; [1972–1974] SLR 391, *Haw Par Brothers v Dato Aw Kow* [1973] 2 MLJ 169; [1972–1974] SLR 183; *Leong Sun Wing v Wah Hup Engineering Works Sdn Bhd (No 2)* [1977] CSLR VII [1003]; *Molomby*; *Welch & Anor v Britannia Industries Pte Ltd* [1993] 1 SLR 673; *Edman v Ross* (1922) 22 SR (NSW) 351; and *Conway & Ors v Petronius Clothing Co Ltd & Ors* [1978] 1 All ER 185; [1978] 1 WLR 72;
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- (3) there is no residual discretion in the court to refuse inspection. Where the court bars a director from exercising his right of inspection, it is not in fact exercising a residual discretion, but is in such an event satisfied on the basis of the evidence before it that the director's intention is to use the information obtained for ulterior purposes such as with a view to causing detriment to the company and that the director is thus abusing the confidence reposed in him; *Berlei Hestia (NZ) Ltd v Fernyhough* [1980] 2 NZLR 150 per Mahon J; A
- (4) the right of a director to inspect the books and records of the company flows from his office as a director and enables him to perform his duties as a director. The corollary of this is that the right will be lost where it is exercised not to advance the interests of the company but some other ulterior purpose to injure the company: *Edman v Ross, Molomby; Deluge Holdings Pty Ltd & Anor v Bowlay & Ors* [1991] 9 ACLC 1486; *Welch & Anor; Re Geneva Finance Ltd (Receiver and Manager Appointed)* (1992) 10 ACLC 668; and *Paul Nicholson lwn Faber Medi-Serve Sdn Bhd dan lain-lain* [2002] 1 MLJ 355. B C D

[17] Having regard to the above relevant principles, we now proceed to consider the correctness or otherwise of the learned judge in refusing the right of inspection, based primarily on the insufficiency or deficiency in the auditor's letter of undertaking. E

UNDERTAKING UNDER S 167(6)

[18] It was contended by plaintiffs' learned counsel Mr Ben Chan, assisted by Ms Vanessa Wong, that the learned judge had erred in holding that the auditor's letter of undertaking was insufficient to meet the requirements of s 167(6). Support was sought in: F

- (1) *Wuu Khok Chiang George*;
(2) *Edman v Ross*; and
(3) *Paul Nicholson*. G

[19] Defendant's learned counsel, Mr Lim Kian Leong (Ms Tan Pak Theen with him) submitted that the letter of undertaking was defective on grounds of non-compliance with statutory requirements as: H

- (1) It is not addressed to the court; and
(2) The auditor has extended the class of persons beyond the plaintiffs. I

[20] We now apply s 167(6) to the impugned letter of undertaking which merits reproduction as follows:

- A** Letter of Undertaking
Undertaking During Inspection of the records of
Tan Chong Consolidated Sdn Bhd
- B** I, Yeo Eng Seng, an approved company auditor and a partner of Ernst & Young, act for Dato' Tan Kim Hor, Tan Kheng Leong @ Tan Hoy Shoi, Tan Kang Leong and Tan Boon Pun.
- C** Save as required by law or a Court order, I hereby undertake not to disclose or otherwise make available to any third party any information acquired during an inspection of the accounting and other records of Tan Chong Consolidated Sdn. Bhd, except to those of my officers, employees, appointed servants or agents who are required by me in the course of the inspection to receive and consider the information and to:
- D** Dato' Tan Kim Hor;
Tan Kheng Leong @Tan Hoy Shoi;
Tan Keng Leong; and
Tan Boon Pun
- E** who are directors of Tan Chong Consolidated Sdn. Bhd and/or their appointed servants/agents of the same.
- This undertaking shall not apply to information or document which is or has already been made lawfully available to the public and this undertaking is governed by and shall be construed in accordance with Malaysian Law.
- F** Yours faithfully
Yeo Eng Seng
Partner
Ernst & Young
- G** Dated this: 22 August 2000

- H** [21] In determining *whether the undertaking is addressed to the court*, it is necessary for us to take into account the sworn statements made by the plaintiffs in their respective affidavits in support which include, inter alia, para 7 affirmed by the first plaintiff in the following words:

- I** 7 Yeo Eng Seng is prepared to give to this Honourable Court a Letter of Undertaking which provides that they will not disclose any information acquired during inspection of accounting and other records of the company to anyone except to me ...

[22] Viewing the impugned letter of undertaking objectively, we entertain no doubt that the undertaking, specifically stated in para 7, is given for the

avowed purpose of supporting the plaintiffs' originating summons. While it is true that it does not contain a clause expressly addressing it to the court, the inclusion of the undertaking as one of the exhibits annexed to the affidavit in support of the plaintiffs' originating summons makes it clear that the undertaking is intended to fulfil the requirements of s 167(6). Section 167(6) deserves to receive a purposive interpretation which is now given statutory recognition in s 17A of the Interpretation Acts 1948 and 1967, reproduced below:

Regard to be had to the purpose of Act

17A In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[23] It needs to be observed that s 167(6) does not prescribe a statutory form of undertaking. In substance, the undertaking is clear and unambiguous as it is given for the purpose of carrying out the inspection and the information obtained thereby shall not be disclosed. It is clearly intended to satisfy the requirements of s 167(6). It is meant for use in the court. Even if a form is prescribed, slight deviations therefrom are permissible. Section 71 of the Interpretation Acts 1948 and 1967 is singularly significant. It specifically states as follows:

Forms

71 Save as is otherwise expressly provided, whenever forms are prescribed slight deviations therefrom, not affecting the substance or calculated to mislead, shall not invalidate them.

[24] As regards the persons (other than the plaintiffs) who could receive the information, we are of the view that the innocuous inclusion of the words which *extend to appointed servants/agents etc* in the letter of undertaking was done *ex abundante cautela*. Be that as it may, the inclusion thereof does not in any way transform the undertaking into a conditional or defective undertaking, as illustrated in a number of judgments of our courts.

[25] In *Dato' Ting Cheek Sii v Sanyan Wood Industries Sdn Bhd* [2007] MLJU 38; [2007] 1 LNS 280 (HC), Linton Albert J held, inter alia, that the innocuous inclusion of the words 'and his solicitors' in the undertaking required under s 167(6) had not transformed the undertaking into a conditional undertaking.

[26] In *Leong Sun Wing*, Zakaria Yatim J (later FCJ) had even allowed an application and granted an order for inspection although there was no such

A undertaking at all in the first place. His Lordship deferred the letter of undertaking to be given to the court subsequently, but before the order was extracted.

B [27] A similar deferment was demonstrated in *Loh Yoon Sang v Ivory Pearl Sdn Bhd* [2003] MLJU 302; [2003] 7 CLJ 405, where Balia Yusof JC (now J) made an order of inspection first and allowed the named auditor to give an undertaking in writing subsequent thereto.

C [28] In our view, s 167(6) is intended to facilitate and liberalise, and is not meant to impede, the right of inspection. Indeed, almost unbridled powers are conferred upon the court to give effect to the directors' right of inspection. Clearly, it is within the powers of the court to allow the plaintiffs to furnish a fresh undertaking by the auditor in terms as required by the court, by addressing it to the court and by deleting therefrom the words
D relating to the appointed servants/agents. This is especially so after the learned judge had arrived at a specific decision that the defendant had, in the first instance, failed to discharge its burden to show that the plaintiffs' inspection would result in any detriment to the interests of the defendant.
E That is a reaffirmation that the right of inspection by the plaintiffs as directors of the defendants pursuant to s 167(6) is 'absolute'.

CONCLUSION

F [29] On the foregoing grounds, we unanimously allowed this appeal with costs here and in the court below. We made a consequential order that the words relating to the appointed servants/agents be deleted from the undertaking. The order of the High Court was set aside. Deposit to the plaintiffs on account of taxed costs.

G *Appeal allowed with costs in this court and the court below.*

Reported by K Nesan

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